



POLICE DEPARTMENT CITY OF NEW YORK

December 7, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Juan Lucio
Tax Registry No. 938890
40 Precinct
Disciplinary Case No. 2016-16529

Charges and Specifications:

1. Said Police Officer Juan Lucio, while on-duty and assigned to the 40 Precinct, on or about and between January 1, 2015 and April 11, 2016, did engage in conduct prejudicial to the good order, efficiency, and discipline of the Department, to wit: said Police Officer Lucio inappropriately touched a person known to the Police Department on at least four (4) occasions.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED
CONDUCT

Appearances:

For the Department: Jordan Farnham, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Craig Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, NY 10038

Hearing Date:

August 9, 2017 and October 17, 2017

Decision:

Guilty In Part

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on August 9, 2017, and October 17, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Police Officer Isadore Rodriguez and Police Officer Michael Sheehan as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty in part of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that during the time period from January 1, 2015, to April 11, 2016, Police Officers Isadore Rodriguez, Michael Sheehan and Respondent were all assigned to the 40 precinct. The three officers worked midnight tours of duty. Officers Rodriguez and Sheehan were steady partners for almost four years. The issue in this case is whether Respondent touched Officer Rodriguez inappropriately on at least four occasions during the above time period.

Officer Rodriguez testified that in early 2015, while he was on duty inside the 40 precinct waiting near the desk for a set of car keys, he felt a tap on his rear end. When he turned around, he saw that Respondent had walked by him and was within arm's reach, "kind of snickering." Officer Rodriguez told Respondent that he "didn't play like that," and told him not to touch him again. (Tr. 11) Respondent was the only person directly behind him and no other officer stopped to respond to Officer Rodriguez. When asked on redirect whether Respondent "ever [told Officer Rodriguez] that he [did not touch him], Rodriguez testified that Respondent did not make any such statement. (Tr. 45) On this occasion, he did not tell any supervisor or superior officer about

the incident because he assumed Respondent would respect his wishes. (Tr. 14-15) Officer Rodriguez testified that while there is a lot of, "unnecessary touching and horseplay that happens in the command," he is not one of the guys who is okay with it and he has addressed it when other officers have tried it with him, never having further issues with those officers afterward. (Tr. 12) He noted that he did not think this would become an ongoing situation with Respondent. He explained that he "kind of dismissed the first [incident]" and did not involve a supervisor, as he believed he had addressed it and thought that Respondent would respect his wishes as other officers had. (Tr. 11, 14-15)

In "mid to Spring of 2015," Officer Rodriguez was in the muster room of the 40 precinct after the completion of roll call when he felt a tap on his rear end. Respondent was an arm's distance away. When Officer Rodriguez felt the tap, he cursed at Respondent, who was in his direct line of sight, and told him to stop playing games and to keep his hands to himself. He remembered using words in sum and substance that he didn't want to hit Respondent and stated that his tone was "a lot more aggressive the second time." Officer Rodriguez described Respondent's reaction as, "kind of a brushoff attitude," "he kind of joked it off . . . just kind of snickered and [said] 'oooooh okay.'" Respondent did not deny touching Officer Rodriguez. (Tr. 16-18, 45) Officer Rodriguez did not tell a supervisor about this incident and resumed patrol. (Tr. 18)

On April 8, 2016, Officer Rodriguez was running a bit late for roll call and as he was making his way through the ranks of other officers, he was passing Respondent when he felt, "like a gentle kind of swipe of a finger across my buttocks." He specified that he was behind Respondent when he felt the swipe. Officer Rodriguez turned around and "aggressively" told Respondent, who was about four to five feet away, he was going to hit him. He testified he

cursed at Respondent and told him not to play those "hand games" with him. He further told Respondent he liked him, he was a good guy, and he didn't want to have to hurt him. Rodriguez stated that the room was "pretty full" at this time, as roll call had just let out.

According to Officer Rodriguez, Respondent then put up his hands with palms facing outward and said, "I didn't know. I'm sorry...so touchy." (Tr. 19-20) Respondent again did not deny touching him. (Tr. 45) Officer Rodriguez stated that he did not tell any supervisor about this incident because it would have put Respondent in a "bad spot," explaining that since he worked with Respondent, if Respondent called for help he didn't want to have to second guess whether he should go help Respondent. He further testified that he just told himself he would keep a distance from Respondent who needed to "grow up." (Tr. 21-22)

On April 11, 2016, Officer Rodriguez had another incident with Respondent. He did not remember exactly why he returned to the precinct from patrol, but remembered hearing that something that sounded important had happened at the precinct. He described the scene when he got to the precinct as a little chaotic but under control. He saw some officers in the TS area watching a video of what had happened on a cell phone and he went over to see what was going on. At one point, as he was standing with approximately four or five other officers around him, he turned and saw Respondent coming into the precinct. Officer Rodriguez testified that he again felt the same swipe across his buttocks as he had felt a few days before. He looked to his right and Respondent was the only officer walking away to his right. No other officers were behind him. Officer Rodriguez kicked Respondent and became "animated," shouting "how many times do I got to tell you . . . not to f-ing touch me." Respondent denied he touched him, which Rodriguez believed he did because he became embarrassed. Officer Rodriguez had to be escorted outside. (Tr. 23-26, 46)

Officer Rodriguez advised a sergeant about this incident during his meal break. He testified that the sergeant had been present to see Officer Rodriguez react towards Respondent so he explained the situation and said he wanted to file an EEO complaint against Respondent. He had never filed a complaint against another officer before this. (Tr. 26-27) Officer Rodriguez testified that during the time frame of the four incidents he remained friendly with Respondent. (Tr. 27- 29) Officer Rodriguez received a CD and was warned and admonished for kicking Respondent. (Tr. 29)

When asked why the touching bothered him, Officer Rodriguez explained, "It's unprofessional. It's unwanted—as far as I'm concerned, never gave him the impression that I was okay with that. It's pretty clear in the precinct that I don't play those hand games . . . I'll just walk away. That's too much. So they'll know."

On cross-examination, Officer Rodriguez acknowledged that there were several officers in his command who engaged in what he described as horseplay and immature actions. He further agreed that the first incident occurred during a busy time in the precinct and Respondent was not the only person in his proximity during the incident, though he confirmed on redirect that Respondent was the only person directly behind him. He never actually saw Respondent touch him. (Tr. 31-32, 45) With regard to the second incident, it occurred when at least five other officers were still in the muster room after roll call had just finished. When he turned around after feeling the tap, Respondent was present, but he did not actually see Respondent touch him. (Tr. 32-33) The third incident occurred when "multiple lines" of officers were present as roll call was finishing up. Officer Rodriguez walked through the lines. When he felt the gentle swipe, he turned around and Respondent was there, standing to his left, but he acquiesced that other officers were present as well. He did not actually see Respondent touch him. (Tr. 36-38) He

acknowledged that there could have been one or two bosses present during roll call that day but stated that no boss ever inquired as to why he began yelling. (Tr. 39) With regard to the fourth incident, Officer Rodriguez acknowledged that again, he did not see Respondent touch him. He did, however, assert on redirect that when he turned around, there were no other officers around Respondent, who was behind him. (Tr. 41, 46)

Officer Michael Sheehan testified that he was partner to Officer Rodriguez for approximately four years and agreed that he considered him a friend, explaining, "We talk to each other, I see him all the time at work and stuff. Still good friends." (Tr. 54, 72) He stated that Officer Rodriguez had told him on multiple occasions that Respondent had touched him inappropriately. He further testified that in early 2015, as he approached Officer Rodriguez after a roll call, he saw Officer Rodriguez turn to face Respondent, who had been behind him, and say, in a calm but firm way, "I don't play with the hands like that." He heard Respondent laugh a bit and say, "No, it's okay, buddy." (Tr. 56) Later, Officer Rodriguez told Officer Sheehan that Respondent, "touched his ass." (Tr. 57)

Officer Sheehan was in the muster room on April 8, 2016. After roll call was over, Officer Sheehan walked towards Officer Rodriguez and heard him say to Respondent, "I told you before I don't play with the hands like that. Don't touch me." He described Officer Rodriguez's tone as more "aggressive" and "strict" this time. He heard Respondent again say, "it's okay, buddy," while "kind of giggling, laughing a little bit." When he got into the patrol car, he asked Officer Rodriguez what the discussion was about and Officer Rodriguez again told him that the Respondent, "touched his ass." (Tr. 58-59)

On April 11, 2016, as he was standing with Officer Rodriguez and a sergeant near the sergeant's desk in the precinct watching a video, someone came in through the door and walked

by Officer Rodriguez. Rodriguez, he recalled, turned around, moved towards the individual, who by that point Sheehan realized was Respondent, and kicked him in the buttocks. He could not recall if anyone else was around the Respondent at that time. (Tr. 59-60) Officer Sheehan heard Officer Rodriguez tell Respondent, "I told you before . . . don't touch me like that...I don't play like that." He did not hear any response from Respondent. Officer Sheehan testified that he saw it was getting "really heated," so he pulled Officer Rodriguez out of the precinct. Officer Rodriguez told him that Respondent had, "touched his ass again" and complained that he had told Respondent not to touch him on numerous occasions (Tr. 61-62)

Officer Sheehan described the relationship between Officer Rodriguez and Respondent as, "really good," before these incidents. He also described his own relationship with Respondent as, "very good." (Tr. 62-63)

On cross-examination, Officer Sheehan acknowledged that he had never seen Respondent touch Officer Rodriguez, nor had he seen his hand near Officer Rodriguez's buttocks. He also agreed he had never seen Respondent moving away, "looking like he might have just touched" Officer Rodriguez and had not directly observed any misconduct on Respondent's part. (Tr. 64)

With regard to the 2015 incident at roll call, Officer Sheehan testified that there were usually approximately 15 people standing for roll call but further noted that on midnights, "it's small, not too many cops." (Tr. 65) Officer Sheehan was in a row with Officer Rodriguez and Respondent was in a row behind them, with other officers in his immediate proximity. Officer Sheehan was not aware of any other officers coming forward to say they saw the touching take place. (Tr. 66)

Officer Sheehan testified that during the second incident at roll call, there were again many officers present. He was not aware of any other officers indicating they saw any inappropriate actions. (Tr. 67-68)

With regard to the incident where officers were watching a video, Officer Sheehan testified that a sergeant was also present. (Tr. 69) Based on his knowledge, it was only after Officer Rodriguez kicked Respondent, which Officer Sheehan acknowledged constituted misconduct, that Officer Rodriguez made any complaint to the Department about Respondent touching him. (Tr. 70-71)

On redirect, Officer Sheehan testified that he had "never" seen Officer Rodriguez react to any other officer the way he reacted to Respondent. He had no knowledge of Officer Rodriguez levying accusations of inappropriate touching against any other officers. (Tr. 71-72)

Respondent testified on his own behalf and denied that he ever touched Officer Rodriguez's buttocks or any part of his body in any way prior to April 11, 2016. Specifically, he denied taking his finger and touching him in the buttocks or anywhere else on April 11, 2016. (Tr. 81) With regard to that day, Respondent described how he was attending to an aided inside the precinct in a crowded area. He returned inside the precinct after helping EMS with the aided and as he passed the desk area he felt a hard kick from behind. He turned around and Officer Rodriguez was right behind him. He cursed at Officer Rodriguez and said, "what the fuck you doing this for." (Tr. 78-79) He recalled that Rodriguez was also "saying something," but did not remember what he said. (Tr. 80) Respondent testified he had his radio on the left side of his body that night and that after the incident Sergeant Stocker told him it was probably his radio antenna that touched Officer Rodriguez. (Tr. 80-82)

On cross-examination, Respondent stated that prior to the April 11 kicking incident, Officer Rodriguez had never confronted him about being touched. He specifically contended that the three prior confrontational conversations about touching that Officer Rodriguez recounted during his testimony did not occur. (Tr. 82-83) Respondent did not report the kick until he found out he was the subject of an investigation. (Tr. 84)

In analyzing a case like this one where there are opposing accounts provided by the involved individuals, factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account by the finder of fact (*Maloney v. Suardy*, 202 A.D.2d 297 (1st Dep't 1994)). Here, considering these factors, I find the credible evidence indicates that Respondent did engage in inappropriate touching of Officer Rodriguez's buttocks on the latter three occasions outlined above.

I found Officers Rodriguez and Sheehan to be credible in their specific but measured descriptions of the disputed events. The fact that both of these officers acknowledged that they did not see Respondent actually engaging in the touching bolsters their credibility, as one or both of them could have claimed to have observed the touching firsthand in an effort to strengthen Rodriguez's claims. Rodriguez's explanation that he tried to be more forceful in tone each time until finally on the fourth occasion, he could no longer contain his anger had the ring of truth, as did his statement that he did not report the earlier incidents because he wanted to maintain a tension-free working relationship.

The corroborating testimony of Officer Sheehan is, in the view of this tribunal, perhaps the most important piece in discerning the truth as to what transpired. Sheehan testified in a wholly professional and straightforward manner. His testimony lacked any hint of embellishment

or bias against Respondent. If anything, it appeared to this court that Officer Sheehan genuinely liked and still likes Respondent, going as far as to state on direct examination, "I always had a good relationship with Officer Lucio. I still do." This is not the type of statement that an officer who was fabricating or embellishing the things he had seen and heard in order to implicate Respondent in misconduct would make. Though he also had what seemed to be a very friendly relationship with his then-partner, he in no way appeared to be making false allegations against Respondent out of loyalty to Rodriguez and his statement that he had never before seen Rodriguez react to another officer the way he reacted to Respondent was, in my view, entirely genuine. As stated above, he could have bolstered Rodriguez's allegations by stating he saw touching but was very clear that he did not even observe Respondent's hand near Rodriguez. He was precise in his detailing of what he had and had not observed and for that reason, his testimony that he heard Rodriguez on three occasions, with increasing aggressiveness in his tone, tell Respondent not to touch him substantially corroborates Rodriguez's account of his interactions with Respondent.

Respondent, on the other hand, incredibly testified that he had no conversations with Rodriguez regarding his wishes not to be touched, thereby asking the tribunal to believe that Rodriguez cursed at and kicked him over one isolated purported touch and then concocted three prior interactions, spaced months apart and arranged to have them corroborated in part by Sheehan. While it is true that the reports of touching were made only after Rodriguez became physically aggressive toward Respondent, that issue was handled with a Schedule A command discipline for which Rodriguez was warned & admonished. This does not appear to be a situation where Rodriguez was levying allegations against Respondent in the hopes of obtaining a more favorable disciplinary outcome for himself. Moreover, with respect to the three

occasions where Sheehan was present, Sheehan credibly testified that shortly after each of those alleged incidents occurred, Officer Rodriguez told him that Respondent "touched his ass," undercutting the notion that Rodriguez made up the earlier incidents to make himself seem less culpable for kicking Respondent.

The tribunal finds that Respondent's testimony that there had been no previous confrontations or even discussions about Rodriguez's desire not to be touched strains credulity and is simply not believable nor consistent with anything else in the record. It is quite convenient that Respondent denies the two interactions where he allegedly, according to both Rodriguez and Sheehan, laughed, snickered and patronizingly stated, "It's okay buddy." Respondent's reaction supports a finding that he did not respect Rodriguez's protestations and did not take his objections seriously. This type of immature reaction to a colleague's reasonable request is another factor supporting the conclusion that Respondent engaged in the charged misconduct. As the accused party who harbors a significant interest in the outcome of this case, Respondent, in failing to be candid regarding these interactions that are so central to this case, created serious doubt regarding the veracity of his testimony.

Though these implausible denials significantly undercut Respondent's credibility, the onus is not on Respondent to prove that the touching did not occur. As such, with respect to the very first incident alleged, which took place at the desk and where the only information in the record is that of Rodriguez's allegation and Respondent's denial, the record failed to prove this incident.

With respect to the three subsequent allegations, the tribunal readily acknowledges that there is no witness who observed the touching firsthand and that other individuals were present when these incidents were alleged to have occurred. It is striking, though, that on each of these

occasions, both Rodriguez and Sheehan state that Respondent was right behind Rodriguez at the moment he claimed someone touched him. This troubling pattern, taken together with the credible, consistent testimony from Rodriguez and Sheehan as to Respondent's positioning and both Rodriguez and Respondent's reactions, the doubts as to Respondent's veracity as outlined above and the lack of established motive for Rodriguez and Sheehan to fabricate these very specific allegations, makes it more likely than not that Respondent engaged in inappropriate touching of Officer Rodriguez on these three occasions. Accordingly, Respondent is found Guilty in part of the latter three incidents of inappropriate touching.

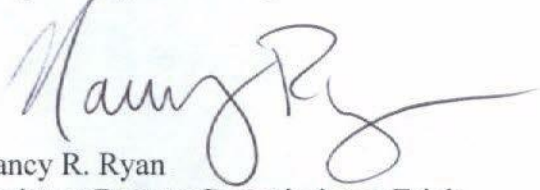
PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 11, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department has requested a penalty of ten (10) vacation days but presented no precedent in support of that penalty. Indeed, there appears to be little precedent for a set of circumstances like this one involving a pattern of inappropriate touching that is not part of a larger sexual harassment issue. Still, any inappropriate touching of colleagues is unacceptable and cannot be tolerated in a Department that prides itself on courtesy, professionalism and respect. The tribunal is particularly troubled by Respondent's pattern of repeated touching despite being on notice that such touching was inappropriate by Officer Rodriguez. With that in mind, and taking into account that the Department did not meet its burden on the first of the four alleged incidents and that Respondent has already borne consequences for his misconduct in

being transferred from the precinct where he began his career and spent over a decade, I recommend that Respondent's penalty be the forfeiture of six (6) vacation days.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

JAN 18 2018

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JUAN LUCIO
TAX REGISTRY NO. 938890
DISCIPLINARY CASE NO. 2016-16529

Respondent was appointed to the Department on July 11, 2005. On his last three annual performance evaluations, he received 4.0 overall ratings of "Highly Competent" in 2014 and 2015, and a 3.5 "Highly Competent/ Competent" rating in 2016. He has been awarded one medal for Excellent Police Duty. [REDACTED]

In 2008, Respondent pled Guilty to, after being involved in a police incident while off-duty, failing to report the facts of said incident to his Commanding Officer. Respondent, who was a probationary police officer at the time of the incident, forfeited twenty-four (24) suspension days without pay.

In connection with the instant charges and specifications, Respondent was placed on Level 1 Discipline Monitoring on February 21, 2017.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner - Trials